HIGHLANDS AND LOWLANDS BHD

v.

SURUHANJAYA SYARIKAT MALAYSIA;
ARSHIDI IBRAHIM & ORS (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24 NCC-85-2010]
26 JULY 2010

CIVIL PROCEDURE: *Parties - Intervention - Application to intervene in proceedings - Order of court perfected and sealed before application filed by intended interveners - Whether court functus officio - Whether there were pending proceedings - Hong Leong Bank Bhd v. Staghorn Sdn Bhd*

The plaintiff had filed an originating summons against the Suruhanjaya Syarikat ('the defendant'), claiming for, *inter alia*, a declaration that the Form 49 return giving particulars in register of directors, managers and secretaries and changes of particulars which was filed and registered with the defendant, was forged, invalid and bore no effect. A case of fraudulent entry in the defendant's register had been shown, thereby an order in terms of the plaintiff's application was granted. The order of the court had been perfected and sealed before an application was filed by the intended interveners in encl. 6. In the circumstances, both the plaintiff and the defendant raised an objection based on the fact that the court was *functus officio*. The plaintiff raised this point as a preliminary objection. The proposed interveners attempted to argue that the application came within an exception to the *functus officio* rule, stating that they could raise grounds of illegality and absence of jurisdiction.

Held (allowing the preliminary objection with costs):

(1) There was no illegality or absence of jurisdiction in the circumstances and in light of the express provisions in s. 162 of the Companies Act. On the law, this court was bound by the Federal Court decision in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd* which requires the existence of "pending proceedings" before any proposed intervener could be allowed to intervene. There were no "pending proceedings" before this court when the application for leave to intervene was filed. (paras 19-22)

(2) The proper course of action to be taken by the proposed interveners should be to file a separate action to set aside the order, if it was thought the order was illegal or made in absence of jurisdiction. A setting aside application can only be done by a fresh action: *Hock Hua Bank Bhd v. Sahari Murid*. (para 24)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 162

Rules of the High Court 1980, O. 88 r. 3(2), O. 92 r. 4

For the plaintiff - SA Wok (Amer Hamzah Arshad with him); M/s Zain & Co

For the defendant - Azurah Nor Sarif; Companies Commission of Malaysia

For the interveners - Stanislaus; M/s Hasshahari & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamad Ariff Yusof J:

[1] In the originating summons action filed by the plaintiff, Highlands and Lowlands Bhd, the defendant was Suruhanjaya Syarikat Malaysia. The reliefs claimed were for *inter alia*, a declaration that the valid directors of the plaintiff company from 27 November 2007 to date were Dato' Abd Wahab bin Maskan and Dato' K Sekhar a/l S Krishnan, and since 9 July 2008 to date, one Tong Poh Keow. There were three other declaratory reliefs, namely a declaration that Arshidi bin Ibrahim and Mohd Zaidi bin Md Zainol were never at any material time appointed as directors of the plaintiff company, and a declaration that one Datuk Mohamed Fadzil bin Mohd Yunus had resigned from his post as director of the plaintiff company with effect from 27 November 2007, and the third declaration being that the Form 49 (return giving particulars in register of directors, managers and secretaries and changes of particulars) dated 14 November 2008 which was filed and registered with the defendant, was forged, invalid and bore no effect.

[2] The action was brought under s. 162 of the Companies Act 1965 and O. 88 r. 3(2) Rules of the High Court 1980.

[3] The plaintiff company also applied for an order that the defendant immediately rectify the company register of the plaintiff company by rejecting, cancelling and invalidating Form 48A dated 14 November 2008 and Form 49 of the same date, and that the particulars therein be deleted, set aside and removed from the defendant's register as if it had never been lodged and it was not to have any effect whatsoever. In addition, the defendant was to accept and register the plaintiff's Forms

48A and 49 dated 27 and 28 November 2007 which were lodged with the defendant on 19 December 2007, and the contents in them be registered in the defendant's register to take effect from 27 and 28 November 2007 respectively. Further, the defendant was to accept and register the plaintiff company's Forms 48A and 49 dated 9 July 2008 which were registered with the defendant on 27 August 2008 and that the particulars of them be registered in the defendant's register to take effect from 9 July 2008.

[4] The last prayer included an order to remove and cancel the names and particulars of Arshidi bin Ibrahim, Mohd Zaidi bin Md Zainol and Datuk Mohamed Fadzil bin Mohd Yunus as directors of the plaintiff company.

[5] The details of the grounds leading to the present application by the plaintiff company against the defendant are elaborated in the affidavit in support and the affidavit in reply affirmed by Dato' K Sekhar a/l S Krishnan, who is currently the Executive Vice President, Group Corporate Services of Sime Darby Bhd. The plaintiff is a wholly-owned subsidiary of Sime Darby Bhd. See encls. 2 and 8 for the said affidavits of Dato' K Sekhar.

[6] The plaintiff came to realise sometime around December 2009 or January 2010 that the copies of Forms 48A and 49 of the plaintiff which were lodged with the defendant on 19 December 2007 and 27 August 2008 had been withdrawn or cancelled. Instead, Form 49 dated 14 November 2008 was lodged in their place. This latter Form 49 was, according to the plaintiff, forged. This particular Form 49 was allegedly prepared and lodged by one Puan Moriami binti Mohamed as company secretary of the plaintiff company. Puan Moriami had in fact already resigned as company secretary on 29 November 2007 and therefore could not have prepared and lodged this Form 49. Puan Moriami had expressly denied signing and preparing the forged Form 49 and had affirmed a statutory declaration in this regard. She had even lodged a police report on this. See exh. "DSK-7" to the Affidavit in Reply of Dato' K Sekhar.

[7] These revelations came to light after an action was filed in the Shah Alam High Court purportedly by the plaintiff against Sime Darby Elmina Development Sdn Bhd, which is also a subsidiary company of Sime Darby Bhd. An order had been obtained against Sime Darby Elmina compelling it to retransfer a piece of land to the plaintiff. According to Dato' K Sekhar, this action had not been authorised by the plaintiff company and the land concerned had been agreed to be transferred by the plaintiff to Sime Darby Elmina.

[8] The plaintiff then made a complaint to the defendant in which it requested the defendant to undertake necessary investigations and that the defendant's register be rectified to state the correct names and particulars of the lawful directors of the plaintiff company.

[9] The defendant informed the plaintiff that a court order was necessary before the defendant could proceed to rectify the register. Hence the plaintiff company filed the originating summons against the defendant on the basis of s. 162 of the Companies Act to rectify the entry in the defendant's register.

[10] I was satisfied a case of fraudulent entry in the defendant's register had been shown, and thereby granted an order in terms of the plaintiff's application in encl. 1 on 13 April 2010.

[11] The order of this court had been perfected and sealed before an application was filed by the intended interveners in encl. 6 on or about 18 May 2010.

[12] By this summons in chambers filed by the intended interveners, the following reliefs *inter alia* were prayed for:

(a) That the intended interveners be granted leave to intervene as a party to these proceedings;

(b) That this court's order dated 13 April 2010 be struck out with costs or in the inherent jurisdiction of this court;

(c) That the originating summons dated 25 March 2010 be struck out with costs or in the inherent jurisdiction of this court;

(d) That all execution proceedings in respect of the order dated 13 April 2010 be stayed pending disposal of the intervener proceedings and/or any appeal thereon.

[13] It is important to note that when the summons in chambers for leave to intervene was filed, the defendant had given effect to the order and had duly corrected the particulars in the register.

[14] In the circumstances, both the plaintiff and the defendant raised an objection based on the fact that the court was *functus officio*. The plaintiff raised this point as a preliminary objection, for which notice was given to the solicitors for the proposed interveners. Counsel for the plaintiff submitted thus:

> It is hereby submitted that the said application filed by the proposed interveners and in fact, the reliefs sought by the proposed interveners therein are riddled with irregularities and should therefore not be considered by this honourable court. Notwithstanding the numerous

procedural irregularities which arise in the said application, we hereby wish to raise the following preliminary objection is in respect of the hearing of the said petition:

> That this honourable court has become *functus officio* after the order dated 13 April 2010 was drawn up, sealed and perfected. Therefore, this honourable court has no jurisdiction to hear and/or allow the said application.

[15] I agreed with the stand taken by the plaintiff and the defendant that I was *functus officio* and thereby dismissed the summons in chambers by the intended interveners with costs of RM5,000 to be paid by the proposed interveners to both the plaintiff and the defendant.

[16] On the strength of the available case authorities, it seemed obvious to me that I was *functus officio* that it was therefore not open to the proposed interveners to seek to reverse my earlier decision and attempt to have the order already drawn up, sealed and perfected struck out. The proposed interveners were the very same "directors" who came to be registered as "directors" pursuant to the fraudulent Form 49.

[17] The proposed interveners attempted to argue that the application came within an exception to the *functus officio* rule, stating that they could raise grounds of illegality and absence of jurisdiction. It was argued that a search done in January 2009 showed the proposed interveners as directors of the company.

[18] The case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 was cited in support of the proposed interveners' position.

[19] I was not satisfied there was any illegality or absence of jurisdiction in the circumstances and in light of the express provisions in s. 162 of the Companies Act. After all, even the SSM, as the defendant, had not objected to the plaintiff's application.

[20] In any event, the matter was still under ongoing investigation and it would be conducive to mischief to the public if this court were to allow the register to still subsist based on the fraudulent Form 49.

[21] On the law I was obviously bound by the Federal Court decision in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121, which requires the existence of "pending proceedings" before any proposed intervener can be allowed to intervene. The Federal Court said:

A In an application to intervene by a non-party in a proceeding, all the court has to do is, first, to determine whether there is a proceeding still pending. Where a final order, in this case the order for sale, has been made and perfected clearly the proceeding has concluded. It is then too late to intervene under O. 15 r. 6(2)(b)(ii) of the RHC. (at p. 645)

B

Thus, we see that our courts have been very consistent regarding the scope of the application of this rule. This is very sensible as the words "at any stage of the proceedings ... " necessarily mean that there is a proceeding pending. Once the judgment is entered, the proceeding has come to an end. Furthermore, O. 15 is concerned with a very early C stage of the proceeding, to have all the necessary parties in before the trial begins ... (at p. 638)

[22] Shortly put, there were no "pending proceedings" before this court when the application for leave to intervene was filed.

D **[23]** It would have been improper for me to have relied on the inherent jurisdiction of the court on this O. 92 r. 4, since this particular rule does not confer an unlimited jurisdiction on this court to override established principles of *functus officio*.

E **[24]** The proper course of action to be taken by the proposed interveners should be to file a separate action to set aside the order, if it was thought the order was illegal or made in absence of jurisdiction. A setting aside application can only be done by a fresh action: *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92.

F **[25]** Thus, based on the established authorities, I allowed the preliminary objection with costs to be paid by the proposed interveners to the plaintiff and the defendant.

[26] If the proposed interveners have a case to make out, it is best they await the outcome of the ongoing investigation by the SSM, and G in the process provide all the necessary cooperation required by SSM. However, as evident in the affidavit filed by SSM in reply to the application for leave to intervene, this necessary cooperation seemed lacking. See encl. 12 (affidavit in reply by defendant No. 2), para. 4.

H

I